No. 88-801

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

VSL CORPORATION, INC., et al.,
Petitioners,
VS.
CONMAR CORPORATION, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

MICHAEL C. KELLEY
Counsel of Record
RONALD C. COHEN
SIDLEY & AUSTIN
2049 Century Park East, Suite 3500
Los Angeles, California 90067
(213) 553-8100
Counsel for Petitioners VSL Corporation, Inc. and Losinger AG

DAVID M. BALABANIAN
JAMES L. HUNT
GREGORY P. LANDIS
ALFRED C. PFEIFFER JR.
MCCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000
Counsel for Petitioners Mitsui & Company (U.S.A.), Inc. and Mitsui Bussan Kabushiki Kaisha

M. LAURENCE POPOFSKY
ROBERT A. ROSENFELD
GREGORY S. GILCHRIST
HELLER, EHRMAN, WHITE & MCAULIFFE
333 Bush Street
San Francisco, California 94104
(415) 772-6000
Counsel for Petitioner Shinko Wire Co., Ltd.

Bowne of Los Angeles, Inc., Law Printers (213) 742-0883

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INTRODUCTION

In their Brief in Opposition ("Opp. Br.") Respondents Conmar Corporation, L.R. Yegge Co. and Lawrence R. Yegge ("Respondents") attempt to cloud the record in this case, and obscure the narrow issues presented. Respondents assert non-existent factual and evidentiary issues and erroneously interpret leading lower court cases, all in an effort to suggest that the issues presented for review by Petitioners are both factually complicated and legally insignificant. They are not. Respondents cannot evade a record that is exceptionally clear and well suited for examination of the doctrine of fraudulent concealment, and which presents narrow and dispositive legal issues for resolution by this Court.

The central point of this Reply Brief is that Respondents' own allegations in the Second Amended Complaint

conclusively eliminate all of the so-called "unresolved" factual issues which Respondents rely upon to portray this case as an inappropriate candidate for review by this Court. As a result, if this Court agrees with Petitioners and holds that Respondents are charged with constructive knowledge of the VSL criminal information and guilty plea, Respondents, as a matter of law, will be unable to invoke the doctrine of fraudulent concealment.[1]

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[1]Petitioners will not engage in a lengthy rejoinder to Respondents' tortured attempt to reconcile the conflicts among the Circuits. A brief response, however, is warranted. The Second, Fourth, Fifth, Sixth, and Eighth Circuits have, indeed, charged plaintiffs, as a matter of law, with constructive knowledge of the contents of public records for the purpose of providing inquiry notice. In addition, none of those Circuits has in any way endorsed Respondents' suggestion that the amount of publicity surrounding the public records determines whether a plaintiff will be charged with notice of their contents. In *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977), the Second Circuit was clearly speaking in terms of inquiry notice, separate from the requirement of due diligence, when it charged plaintiffs with knowledge of (1) defendants' admission of violations of the Exchange Act, contained in an SEC release, and (2) reports of financial "peril", contained in a NYSE release, both of which "should have . . . put [plaintiffs] on notice to look deeper." *Id.* at 781. Similarly, in *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976), the Eighth Circuit simply collapsed its discussion of inquiry notice into the due diligence standard in holding that plaintiffs could not invoke fraudulent concealment because they were charged with knowledge of a Tariff Commission report. *Id.*at 295. *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987) could not be more applicable; the Fourth Circuit held that fraudulent concealment was not possible because the information was "necessarily discoverable upon simple inquiry and consultation of public records. . ." *Id.* at 218. The Sixth Circuit treatment of public records in the context of inquiry notice was unequivocal in *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) ("congressional proceedings should have aroused [plaintiff's] suspicions. . ."). The

Respondents' Allegations In the Second Amended Complaint Eliminate Any Factual Issue as to Whether the VSL Criminal Information and Guilty Plea Contained Facts Sufficient To Put Respondents on Inquiry Notice.

The crux of Respondents' argument is that, even if this Court were to charge them with constructive knowledge of the VSL criminal information and guilty plea, there would still remain the "unresolved" factual issue of whether the information in those public records was sufficient to put them on inquiry notice of their claims.[2] However, Respondents' allegations in the Second Amended Complaint make it clear that the VSL guilty

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Fifth Circuit's position has been equally clear. In *United Klans of America v. McGovern*, 621 F.2d 152 (5th Cir. 1980), the court was speaking of inquiry notice when it charged the plaintiff with knowledge of a Senate report, and quoted *Dayco* for the proposition that as a result of the Senate report the plaintiff should have had its suspicions aroused. *Id.* at 155.

[2]Respondents also attempt to reconcile the conflict among the Circuits as to whether a mere denial of wrongdoing can, as a matter of law, constitute fraudulent concealment. Petitioners need only point out that the conflict and confusion in the lower courts is dramatically evidenced by the number of district court opinions that have reached opposite results, most recently in express reliance on the conflicting opinions of the Ninth and Tenth Circuits in *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) and *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248 (9th Cir. 1978). *E.g.*, *Colorado ex rel. Woodard v. Western Paving Construction Co.*, 630 F. Supp. 206, 210 (D. Colo. 1986), *aff'd by equally divided court, en banc*, 841 F.2d 1025 (10th Cir. 1988) (quoting *King & King*, 657 F.2d at 1155: "A denial of wrongdoing does not constitute fraudulent concealment"); *Clow Corp. v. Witco Chemical Corp.*, 1984-2 Trade Cases (CCH) ¶ 66,266 at p. 67,160, 67,161 (N.D. Ill. 1984) (citing *Rutledge*, 576 F.2d at 250).

plea would have put Respondents on notice of their claims if they had actual or constructive notice of it.[3]

Respondents fully set forth the alleged antitrust conspiracy and predatory conduct underlying their claims in paragraphs 30 through 33 of the Second Amended Complaint.[4] Paragraph 34 then alleges:

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[3]Contrary to Respondents' assertion, the VSL information and guilty plea were a part of the district court record. The VSL information and guilty plea were contained in the district court's records of the criminal case, *United States v. VSL Corp.*, No. CR-82-00001 MHP (N.D. Cal., filed January 5, 1982), which was before the *same* district court judge as the instant case. Respondents made express reference to the VSL guilty plea in their Complaint, and Petitioners requested that the district court take judicial notice of, among other things, the information and plea in that prior criminal proceeding in connection with the Motion for Summary Judgment. (CR-15, at p.7, n.4.)

[4]Paragraphs 30 through 33 of the Second Amended Complaint allege as follows:

> "30. Since at least December 30, 1977, Defendants have engaged in a pattern and practice of conspiracy and predatory conduct to violate the laws of the United States affecting interstate trade and commerce in PC Strand including the acts set out above.
>
> 31. All of the acts of Defendants in accomplishing and furthering the conspiracy and predatory conduct in furtherance of, and as the object of, the conspiracy in restraint of trade are not presently known to Plaintiffs but some of said acts include conspiring and agreeing that the sale of SHINKO PC Strand in the United States by MITSUI (Japan) and MITSUI (U.S.A.) to VSL would be, and was, at a price which was below the fair value, TPM, or actual market value or wholesale price of such PC Strand and was therefore unavailable to competitors of VSL under the then prevailing laws of the United States. Such price was substantially lower than the price quoted by MITSUI (U.S.A.) to competitors of VSL for identical SHINKO strand at the same period of time.

"34. VSL has pleaded guilty to criminal charges *alleging, in substance, the facts* as set out in Paragraphs 30 through 33." (CR-5, at ¶ 34.) (Emphasis added.)

In the face of their Complaint, Respondents cannot now argue that there is a factual issue as to whether the VSL criminal information and guilty plea provided sufficient facts to put them on inquiry notice. Respondents have admitted that the VSL criminal charges *alleged the same facts* which now make up Respondents' antitrust claims.[5] Therefore, the dispositive issue on Respondents' fraudu-

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32. The acts of conspiracy and predatory conduct resulting in lesser prices by MITSUI and purchase thereof by VSL in restraint of trade were accomplished by each and all of the Defendants by making and using false writings and documents, making false and fraudulent statements and representations and falsifying and concealing by scheme and device certain material facts to achieve rebates and discounts to VSL and/or LOSINGER in order that the falsified legal invoice prices were fraudulently lowered to actual prices agreed to between MITSUI (Japan and U.S.A.), SHINKO, VSL, and LOSINGER which prices were unavailable to VSL's competitors even if known to them.

33. The prices provided to VSL by MITSUI were in violation of the United States Anti-Dumping Act, 19 U.S.C. § 160 *et seq.* as amended, 19 U.S.C. §§ 1673-1677, and in violation of the minimum "trigger prices" set by the Treasury Department of the United States for imported PC Strand." (CR-5, at ¶¶ 30-33.)

[5]Contrary to Respondents' contention, the Ninth Circuit did not base it decision on a conclusion that the VSL guilty plea did not contain sufficient facts to put Respondents on notice. The Ninth Circuit ruled only that the mention of the VSL guilty plea in the Complaint was not an admission that Respondents had *notice of the plea*. (Petition, at A-7.) That ruling begs the very question presented here — whether Respondents are charged with knowledge of the information and plea, *as a matter of law*, because they are public records.

lent concealment claim is a purely legal one— whether Respondents are charged with constructive knowledge of the VSL information and guilty plea because those are public records.[6]

Respondents attempt to avoid the factually dispositive effect of paragraphs 30 through 34 of their Complaint by arguing that their antitrust claims are based on additional facts not contained in the VSL information and guilty plea. First, Respondents assert that paragraphs 26 and 27 of the Second Amended Complaint (CR-5, at ¶¶ 26, 27) contain allegations of predatory acts which are not founded upon the VSL plea. Second, Respondents argue that the Complaint contains allegations of unlawful acts "not yet fully known by PLAINTIFFS," as if such boilerplate allegations would render the facts contained in the VSL information and guilty plea insufficient to put Respondents on inquiry notice of their claims.

The VSL information and plea revealed that Respondents' main competitor in the post-tensioning industry, VSL, pled guilty to charges that it had reported false purchase prices to Customs in the importation of PC Strand, the key steel product used in post-tensioning. The same factual allegations form the core of Respondents' antitrust claims that Petitioners suppressed competition by importing PC Strand at unlawfully low prices. (CR-5, ¶¶ 30-34.) It is immediately apparent that paragraphs 26

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[6]This Court should similarly ignore Respondents' attempt to raise irrelevant evidentiary issues concerning the admissibility of the news article reporting the VSL guilty plea. As Petitioners emphatically stated in their Petition: "The publicity is beside the point." (Petition, at 11.) This Court need not consider the news article at all; the Question Presented concerns constructive knowledge of public records as such, regardless of any publicity, and wholly irrespective of the news article.

and 27 of the Complaint add nothing of substance to the facts alleged in the VSL criminal information. Paragraph 26 merely repeats the allegation that VSL obtained PC Strand at lower prices than could VSL's competitors. Paragraph 27 only sets forth the alleged anticompetitive *results* of the conspiracy and predatory conduct, and alleges no additional facts about the conduct itself.

Respondents fundamentally misconstrue what it means to be put on "inquiry notice." There is no requirement that a plaintiff have full knowledge of all aspects of its claims. All that is required is that the plaintiff be put on notice of facts that should excite his suspicion, requiring the plaintiff to thereafter exercise due diligence in uncovering its claims from those facts. That the claims might ultimately take on aspects not initially known to the plaintiff is entirely irrelevant.

This case is uniquely and exceptionally suited for review by this Court, precisely because the record is *not* clouded by any of the factual "issues" posed by Respondents. Unlike the cases cited by Respondents (Opp. Br., at 8-9) this case presents no factual issue about whether the facts in the public record were sufficient to put Respondents on inquiry notice. The Complaint expressly acknowledges the link between the facts in the VSL criminal information and guilty plea and the essential facts underlying Respondents' antitrust claims. This Court need only decide the dispositive legal issue of whether Respondents will be charged with knowledge of those facts.[7]

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[7]The only other relevant factual issue — whether Respondents used due diligence after having been put on inquiry notice — has already been decided against Respondents. The Ninth Circuit stated that "[t]he record does not show any inquiry by [Respondents] after [June of 1981]." (Petition, at A-7.)

CONCLUSION

As set forth in the Petition, the Questions Presented are based on a clear and limited record that provides an opportunity for this Court to provide meaningful guidance on the subject of fraudulent concealment; a pervasive issue in federal litigation. Further, the Questions Presented are dispositive of this case if decided against Respondents. Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL C. KELLEY
Counsel of Record
RONALD C. COHEN
SIDLEY & AUSTIN
Counsel for Petitioners VSL Corporation, Inc. and Losinger AG
DAVID M. BALABANIAN
JAMES L. HUNT
GREGORY P. LANDIS
ALFRED C. PFEIFFER JR.
MCCUTCHEN, DOYLE, BROWN & ENERSON
Counsel for Petitioners Mitsui & Company (U.S.A.), Inc. and Mitsui Bussan Kabushiki Kaisha
M. LAURENCE POPOFSKY
ROBERT A. ROSENFELD
GREGORY S. GILCHRIST
HELLER, EHRMAN, WHITE & MCAULIFFE
Counsel for Petitioner Shinko Wire Co., Ltd.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 20, 1988, I served the within Petitioners' Reply Brief in re: "VSL Corporation, Inc. vs. Conmar Corporation" in the United States Supreme Court, October Term, 1988, No. 88-801;

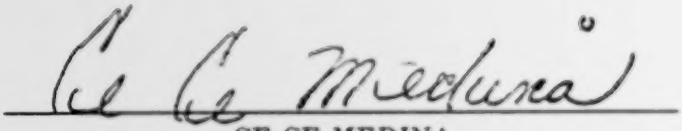
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Robert A. Susk
Law Offices of Robert A. Susk
101 California Street
Suite 4450
San Francisco, California 94111

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on December 20, 1988, at Los Angeles, California



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